

American University International Law Review

Volume 27 | Issue 2

Article 2

2012

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Wald, Patricia M. "Apprehending War Criminals: Does International Cooperation Work?" American University International Law Review 27 no. 2 (2012): 229-263.

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APPREHENDING WAR CRIMINALS: DOES INTERNATIONAL COOPERATION WORK?

PATRICIA M. WALD *

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INTRODUCTION

Corralling high level accused war criminals into the dock has turned out to be a persistent problem for international criminal courts. Unlike the Nuremberg defendants in 1945, secured in Allied hands, this generation of accused perpetrators are typically not in custody at the time they are indicted and indeed may be still performing important official duties for their countries, including acting as Heads of State or engaged in leading opposition forces seeking to unseat the country's government. Even when out of power, former civilian and military leaders accused of war crimes may be in hiding, protected by powerful political or military forces within the

State. In such situations, the task of producing the accused for trial in an international court can pose insurmountable problems for the international court, which has no police force of its own to execute its orders and must depend on the cooperation of independent sovereign states to gain custody. The record of the United Nations-sponsored ad hoc and hybrid courts and of the treaty-based International Criminal Court ("ICC") in securing expeditious custody of their most notorious defendants has been uneven, threatening in some cases to overshadow and taint generally favorable scorecards as to total numbers of accused successfully processed. This article seeks to assess the success of international cooperation in apprehending international war crime defendants, the causes of any deficit, and some suggestions for progress.

A. THE RECORD OF INTERNATIONAL AND HYBRID COURTS IN APPREHENDING DEFENDANTS

The enabling statutes of some international courts¹ specifically instruct the courts to prosecute on a priority basis those "most responsible" for the most serious war crimes, crimes against humanity, and genocide.² In virtually all cases, the Chief

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1. In this article, international courts should be read to include hybrid courts, i.e., those with both national and international judges such as the Special Court of Sierra Leone ("SCSL").

2. See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, art. 1, Jan. 16, 2002, 2178 U.N.T.S. 137 (establishing the Special Court for Sierra Leone to "prosecute persons who bear the greatest responsibility for seriously violations of international humanitarian law and Sierra Leonean law . . ."); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (expressing that the International Criminal Tribunal for the Former Yugoslavia ("ICTY") is aimed at the prosecution of "persons responsible for serious violations of international humanitarian law"); see also S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (noting that the ICTY strategy should "concentrate on the prosecution or trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction . . .").

Prosecutors have publicly adopted the “most responsible” criteria as their prosecutorial priority.³ Certainly, the success of the tribunals is commonly judged by the media and by expert commentators in terms of their ability to bring the highest-ranking perpetrators, Heads of State, army chiefs, and ministers into custody.⁴ Yet, this top echelon of war criminals is invariably the hardest to secure, and even successful efforts often come many years after indictment or issuance of an arrest warrant. Despite a commendable record of eventually accounting, in some official manner, for all 161 of its indictees, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) took an excruciatingly long time after indictment to obtain custody of its three most prominent defendants: Slobodan Milosevic, former President of Yugoslavia and Serbia (five years); Radovan Karadzic, Bosnian Serb President (thirteen years); and Radko Mladic, head of the Bosnian Serb Army (sixteen years).⁵ In

3. See, e.g., Office of the Prosecutor, Int’l Criminal Court, *OTP Road Map in the Libyan Situation Announced by the Prosecutor at the 20th Diplomatic Briefing*, 82 OTP WEEKLY BRIEFING, Apr. 5–11, 2011, at 2 [hereinafter *Issue #82*], available at http://www.icc-cpi.int/NR/rdonlyres/DA36410D-5E1F-4AE6-B3F7-3EDFD14ACACC/283219/OTPWeeklybriefing_511April2011.pdf (stating that the ICC Prosecutor’s Office is “now focusing on identifying those who bear the greatest criminal responsibility”); see also Office of the Prosecutor, Int’l Criminal Court, *Prosecutor Reports to UNSC on the Situation in Libya*, 85 OTP WEEKLY BRIEFING, Apr. 26–May 2, 2011, at 2 [hereinafter *Prosecutor Reports to UNSC*], available at <http://www.icc-cpi.int/NR/rdonlyres/62E64ECC-9AE4-4790-A9F1-961D4E10B0FA/283297/OTPWeeklyBriefing26April2May201185.pdf> (explaining that ICC Office of the Prosecutor “will focus investigations and prosecutions on those who bear the greatest responsibility for the most serious crimes,” including individuals “who ordered, incited, financed or otherwise planned the commission of the alleged crimes”).

4. But see Editorial, *A Step Forward in Serbia*, WASH. POST, May 27, 2011, at A20 (noting that despite the capture of some high ranking perpetrators, other offenders are not intimidated because trials in the Hague and the ICC are “costly” and “interminable,” which ultimately hinders the tribunals’ success); Mark Palmer & Patrick Glen, Op-Ed., *The Crime of Dictatorship*, WASH. POST, Sept. 28, 2011, at A15 (Notwithstanding the successful indictment of Sudan’s Bashir, Bashir remains president and “no country through which he has traveled has tried to arrest him.”).

5. See Aleksander Roknić, *New Mladic Arrest Bid a “Media Show”*, INST. FOR WAR & PEACE REPORTING (Nov. 6, 2010), <http://iwpr.net/report-news/new->

Northern Sudan (Darfur), arrest warrants issued by the ICC against President Al Bashir, for genocide and crimes against humanity, and his minister Ahmad Harun, for crimes against humanity, have been outstanding since 2009 and 2007, respectively.⁶ This is despite the fact that the Darfur referral to the ICC came from the United Nations Security Council and was followed by a report from the ICC to the Council of noncooperation by Sudan, as well as numerous entreaties from ICC Chief Prosecutor Luis Moreno-Ocampo to the Council to bring pressure on the Government of Sudan to hand the over the subjects of the warrants.⁷ The more recent unanimous referral of the Libya situation to the ICC by the same Security Council, and the ICC's issuance of warrants for Muammar Qaddafi, his son, and the head of Libyan intelligence⁸ discussed later in this article, raised similar questions of how their apprehension was to be achieved.

Supporters of international courts argue that indictments and warrants, even if incapable of execution in the accused's home country, still carry significant deterrent value because the accused may be inhibited from travelling far from home, lest he be arrested by another country's police pursuant to treaty,

mladic-arrest-bid-media-show (noting that Mladic had been evading arrest since the Hague indicted him in 1995); see also Tracey Gurd, *Arresting the "Big Fish": Lessons on State Cooperation for the International Criminal Court*, in AEGIS TRUST, *THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW* 27, 29–30 (Nick Donovan ed., 2009) (describing Milosevic's 1999 indictment and subsequent arrest in 2001, as well as how Karadzic remained a fugitive for thirteen years after being indicted in July 1995).

6. See Office of the Prosecutor, Int'l Criminal Court, *Situation in Darfur, the Sudan*, 97 OTP WEEKLY BRIEFING, July 20–25, 2011, at 2 [hereinafter *Issue #97*], available at http://www.icc-cpi.int/NR/rdonlyres/CD685ECC-A4B5-442F-9E5D-8491F594AEEC/283627/OTPWeeklyBriefing_2025July2011.pdf (stating Al Bashir's and Harun's arrest warrants are among three warrants that remain outstanding in Sudan).

7. See *id.* (describing the referral of the situation in Darfur to the ICC, the initiation of an investigation in 2005, and the various charges against Al Bashir for genocide).

8. Office of the Prosecutor, Int'l Criminal Court, *Situation in Libya*, 97 OTP WEEKLY BRIEFING, July 20–25, 2011, at 3 [hereinafter *Situation in Libya*], available at http://www.icc-cpi.int/NR/rdonlyres/CD685ECC-A4B5-442F-9E5D-8491F594AEEC/283627/OTPWeeklyBriefing_2025July2011.pdf.

United Nations obligation, or universal jurisdiction. Out-of-country arrests have in fact occurred in the case of John-Pierre Bemba, a high-ranking politician in the Democratic Republic of Congo (DRC) accused of crimes committed in the Central African Republic (CAR) who was seized by Belgian police while travelling in Brussels, and is now on trial at the ICC.⁹ French police also arrested another ICC accused, Callixte Mbarushmena, the Executive Secretary of a rebel army faction in the DRC, while on a visit to Paris.¹⁰ On the other hand Omar Al-Bashir, the Sudanese President who is the subject of a 2009 ICC indictment, has been welcomed in several African and Mid-East countries, (though not in others) as well as in China and Iran; further, European Union leaders attended his most recent inauguration.¹¹ Similarly Charles Taylor, former Liberian President under indictment by the Special Court of Sierra Leone, after initially being given asylum in Nigeria was later turned over to the Special Court of Sierra Leone but only after widespread opposition to his

9. Press Release, Office of the Prosecutor, Int'l Criminal Court, ICC Arrest Jean-Pierre Bemba – Massive Sexual Crimes in Central African Republic Will Not Go Unpunished (May 24, 2008), <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Related+Cases/ICC+0105+0108/Press+Releases/>; see also Office of the Prosecutor, Int'l Criminal Court, *Situation in the Central African Republic (CAR)*, 92 OTP WEEKLY BRIEFING, June 15–20, 2011, at 3 [hereinafter *Situation in the CAR*], available at http://www.icc-cpi.int/NR/rdonlyres/632983C6-9B9A-4A60-AC8B-4D6ADFCB7927/283476/OTPWeeklyBriefing_1520June2011.pdf (noting that Bemba's trial started on November 22, 2010).

10. Office of the Prosecutor, Int'l Criminal Court, *Situation in the Democratic Republic of the Congo (DRC)*, 92 OTP WEEKLY BRIEFING, June 15–20, 2011, at 2 [hereinafter *Situation in the DRC*], available at http://www.icc-cpi.int/NR/rdonlyres/632983C6-9B9A-4A60-AC8B-4D6ADFCB7927/283476/OTPWeeklyBriefing_1520June2011.pdf.

11. See, e.g., Mark S. Ellis, Op-Ed., *Peace for All or Justice for One?*, N.Y. TIMES, Aug. 11, 2011, <http://www.nytimes.com/2011/08/12/opinion/12iht-edellis12.html> (explaining that the ICC indicted Al Bashir in 2009 on charges of war crimes and crimes against humanity); Andrew Higgins, *China Stands by its Ally in Oil*, WASH. POST, June 23, 2011, at A10 (noting that since Bashir's 2009 indictment, he has been welcomed in China to engage in oil discussions, and in Iran to attend the Global Fight Against Terrorism International Summit); see also *Bashir to be Sworn in Amid Limited International Participation*, SUDAN TRIBUNE, May 26, 2010, <http://www.sudantribune.com/Bashir-to-be-sworn-in-amid-limited,35211> (explaining that local EU representatives attended Bashir's inauguration).

presence in Nigeria surfaced.¹² Although occasionally successful, relying on random visits by the accused to court-friendly countries to secure custody of perpetrators is not an adequate apprehension or deterrence strategy for international courts. Though it has also been suggested that an accused leader who cannot travel to pursue his country's interests abroad will lose face and forfeit diplomatic and economic opportunities for his homeland, empirical proof of such political disadvantages is scanty and certainly not a strong reed upon which an international court should rely to validate the credibility of its processes.¹³

B. STATUTORY PROVISIONS FOR SECURING INTERNATIONAL COOPERATION FOR ARRESTS

How then did the drafters of the international courts' enabling statutes expect to get the accused into court? In the case of the UN sponsored ICTY and its companion, the International Criminal Tribunal for Rwanda ("ICTR"), the tribunals were given "primacy over national courts" in cases that fell within their jurisdiction.¹⁴ This authority authorized them to take such cases,

12. See James A. Goldston, Op-Ed., *Mad Dog in the Hague?*, FOREIGN POL'Y, May 16, 2011, http://www.foreignpolicy.com/articles/2011/05/16/mad_dog_in_the_hague (explaining that Taylor was initially given asylum in exchange for the promise to abstain from participation in Liberia's politics). Ironically, the United States reportedly brokered the deal by which Taylor was given asylum in Nigeria. See Gurd, *supra* note 5, at 30 (according to Nigeria, the United Nations, United States, African Union, and the Economic Community of West African States made the deal to allow Taylor to travel to Nigeria).

13. See, e.g., Higgins, *supra* note 11 (suggesting that despite his outstanding arrest warrant, Bashir knows that he can travel to certain areas of Africa, the Middle East, and Asia without being arrested).

14. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 9(2) (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

along with any accused in national custody, away from the national court. Indeed, this was how the ICTY managed after several years to get its first prisoner in the dock, by asserting primary jurisdiction over Dusko Tadic, who was then in the German criminal justice system.¹⁵ As a loyal UN member, Germany dutifully complied with the ICTY demand.¹⁶

Most ICTY accused however were not in any court's prior custody so basically the ICTY had to rely on the slender hope they would surrender voluntarily or be tracked down and handed over by national police authorities, or by the NATO peacekeeping forces that were overseeing the Dayton Accords and had been given authority to arrest ICTY indicted suspects. None of these methods proved especially effective in the ICTY's early years; the peacekeepers were for the most part notoriously inactive in making such arrests and it took several years for indictees to begin surrendering and those that did were often low and midlevel Bosniak accused rather than the leaders "most responsible" for war crimes. The Balkan countries formerly at war with one another — Serbia, Bosnia, and Croatia — were not anxious to cough up their "homeland heroes" to the fledgling court. The ICTR initially had somewhat better luck with getting neighboring countries, where those accused of participating in the horrendous 1994 genocide in Rwanda had fled, to cooperate in bringing the perpetrators before the international court.¹⁷ The Rome Statute adopted in 1998 established the ICC as a

[hereinafter ICTY Statute]; *see also* International Criminal Tribunal for Rwanda, Statute of the International Criminal Tribunal for Rwanda, art. 8(2) (Jan. 31, 2010), <http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf> [hereinafter ICTR Statute].

15. *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 41 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995) (rejecting Tadić's challenge to the primacy of the ICTY's jurisdiction because he lacked "locus standi" to "raise the issue of the entity's sovereignty rights . . .").

16. *See id.* (noting that Germany "unconditionally accepted" the ICTY's jurisdiction); *cf.* ICTY Statute, *supra* note 13, art. 9(2).

17. *Cf.* Philip Shenon, *War Crimes Suspects Seen As Living Openly in Bosnia: French and U.S. Troops Draw Criticism*, N.Y. TIMES, Dec. 13, 1999, at A14 (describing criticism of the efforts of Western countries to apprehend suspected war criminals).

treaty-based court, but while it gave the Court no primacy provisions like the ad hoc courts, it went further in specifying how those countries which joined the Court must “cooperate” in effectuating its processes.¹⁸ Articles 87, 88, and 89 require States Parties to set up procedures for: cooperation with requests from the Court; cooperation under national laws; and the surrender of persons to the Court.¹⁹ Other provisions in the Statute mandate cooperation in locating relevant witnesses and evidence on request of the Court; the taking of evidence from witnesses, including experts; questioning of persons under investigation by the ICC; facilitation and protection of potential ICC witnesses; examination of suspected war crime burial sites; access to and preservation of possible record evidence; seizure of forfeitable assets as proceeds of crime; and a “catch-all” category for “any other type of assistance not prohibited by law.”²⁰ Were compliance with these obligations uniformly rigorous, the ICC accused located in any State Party would be automatically handed over to the ICC in accordance with the procedures of that country for extradition or other transfer process. Article 59 of the Rome Statute requires that the accused be brought before a local magistrate to determine he is the person named in the warrant and has been accorded his rights under the Rome Statute and the custodial country’s law.²¹ Such a pattern of compliance has not, alas, evolved for reasons discussed below, and it is not, of course, applicable to a non-signatory state. Its main application would be in the native country of the accused where that country is a State Party. The Rome Statute also provides for voluntary surrender of

18. See Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (emphasizing the need for “taking measures at the national level and . . . enhancing international cooperation”).

19. See *id.* art. 87 (elaborating general provisions on the ICC’s authority to request cooperation and assistance from States Parties); art. 88 (creating an obligation on the part of States Parties to have procedures under national law aimed toward cooperation); art. 89 (requiring States Parties to comply with requests for the arrest and surrender of a person and authorize transportation through its territory).

20. See *id.* arts. 86–102 (establishing principles on international cooperation and judicial assistance).

21. See *id.* art. 59.

accused or the issuance by the Court of a summons in lieu of a warrant.²² Although voluntary surrenders were rare in the early years of the ICTY, they became more frequent as the tribunal gained credibility and the postwar governments of the Balkan countries assumed more pro-ICTY stances in response to economic, political, and diplomatic pressures, which resulted in their “negotiating” voluntary surrenders by their residents. In the end, somewhere around two dozen defendants surrendered voluntarily.²³ Article 58 of the Rome Statute provides for summonses on the Prosecutor’s request “if the Pretrial Chamber is satisfied that there are reasonable grounds to believe . . . that a summons is sufficient to ensure the person’s appearance . . . with or without conditions.”²⁴ The ICC has in fact successfully used summons in lieu of arrest warrants in nine instances, including two Darfur defendants accused of attacks on African Union peacekeepers, and more recently in the case of six Kenyan high level individuals allegedly “most responsible” for the thousands of killings, rapes, and civilian displacements that occurred in that country’s post-election violence of 2007.²⁵ The original conditions attached to the Kenya summonses included a bar on any contacts with victims or witnesses or other interference with the ICC investigation, attendance at all required ICC hearings,

22. See *id.* art. 58(7) (“[T]he Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear.”)

23. It is difficult to obtain an exact number of voluntary surrenders to the ICTY. See JULIE KIM, CONG. RESEARCH SERV., RS22097, BALKAN COOPERATION ON WAR CRIMES ISSUES 2 (2008) (“From late 2004 to early 2005, a spate of transfers of mainly Bosnian Serb indictees took place, many the result of voluntary surrenders negotiated by Serbian authorities.”). In addition, the report affirms that former Yugoslav Army generals and the Kosovo Prime Minister surrendered in late 2005. At that time there were only four remaining indictees, none of whom later surrendered. *Id.* at 2-3. See generally STEVEN WOEHREL, CONG. RESEARCH SERV., RS21686, CONDITIONS ON U.S. AID TO SERBIA 2-4 (2008) (detailing the surrender of six indictees in 2002, four in 2003, and fourteen in 2006 to the ICTY).

24. Rome Statute, *supra* note 18, art. 58.

25. See, e.g., Office of the Prosecutor, Int’l Criminal Court, *Judges Assess Possibility of Holding Confirmation of Charges Hearing in the Kenya Cases*, 91 OTP WEEKLY BRIEFING, June 9-14, 2011, at 3 [hereinafter *Issue #91*], available at http://www.icc-cpi.int/NR/rdonlyres/C947FAC2-60B9-4998-AFDC-90E040217B64/283622/OTPWeeklyBriefing_914June2011.pdf.

and abstention from committing new crimes.²⁶ At the suspects' first appearance supplemental conditions were requested by the Prosecution involving financial disclosures and a bar against any public statements that could be construed as a threat to prospective witnesses, as well as additional personal appearances at the Hague every six months to certify compliance with the conditions.²⁷

The Rome Statute authorizes the Court to make findings or inform the Security Council of a country's noncooperation in handing over the accused.²⁸ In the case of Al Bashir, the Court reported noncooperation involving the government of Sudan and the Prosecutor has made several complaints to the Security Council urging it to put pressure on Sudan to comply without results, even though it was the Security Council that referred the Darfur situation to the ICC.²⁹ Indeed the Security Council has been petitioned by Kenya under Article 16 of the Rome Statute to suspend any further action by the ICC, but to date it has not moved on the petition (the United States, though, who is not a member of the ICC, has opposed deferral).³⁰

26. See *Issue #82*, *supra* note 3, at 1 (stressing that a violation of these conditions might "prompt the Chamber to replace the summonses to appear with warrants of arrest").

27. *Id.*, at 1 (warning summoned individuals that triggering further violence by "dangerous speeches" would result in arrests).

28. See Rome Statute, *supra* note 18, art. 87(5)(b) (providing that when a state "fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of State Parties or . . . the Security Council").

29. See *ICC Prosecutor Seeks Non-Cooperation Ruling Against Sudan*, VOICE OF AM. (Apr. 22, 2010), <http://www.voanews.com/english/news/africa/ICC-Prosecutor-Seeks-Noncooperation-Ruling-Against-Sudan-91807509.html>; see also *Issue #82*, *supra* note 3, at 3 (stating that the U.N. Security Council referred the situation in Darfur to the ICC in March 2005).

30. See Stella Ndirangu, Coal. for the Int'l Criminal Court, *Kenyan Civil Society Calls on UNSC to Refuse ICC Investigation Deferral*, 42 THE MONITOR, May–Oct. 2011, at 13

(explaining that Kenyan authorities requested that the U.N. Security Council defer ICC investigation and that the African Union endorsed this request, despite civil society's opposition to these actions); *Omar Al-Bashir*, ENOUGHPROJECT.ORG (Feb. 12, 2009), <http://www.enoughproject.org/category/special-topic/omar-al-bashir> (stating that in addition to the African Union, the Arab League and China have

Two other provisions in the Rome Statute have some potential, albeit indirectly, to facilitate the handover of accused. One is the self-referral of “situations” to the ICC by State Parties themselves pursuant to Articles 13(a) and 14.³¹ Indeed so far four of the seven pending ICC prosecutions or formal investigations have resulted from self-referrals; two have been Security Council referrals (Sudan and Libya) and one (Ivory Coast) was initiated by the Prosecutor.³² The self-referred cases include Democratic Republic of the Congo (“DRC”), the Central African Republic (“CAR”), Uganda, and Kenya. When a State Party refers a situation to the ICC, it promises cooperation with any ensuing investigation even if the original referral was based on alleged crimes by an opposition or rebel leader and the investigation progresses to involve malfeasance by personnel of the referring State itself, which has happened in several instances. In practice however, this broad kind of cooperation does not always come about. In the DRC, for instance, five warrants have been issued against rebel army leaders and only one is still at large, one was arrested in Paris, and the other three were arrested by the DRC government with the help of a United Nations and African Union peacekeeper force.³³ However, complaints have been made by the UN Rapporteur on Arbitrary Executions, and others, that inadequate steps are being taken to secure the fifth arrest.³⁴

also voiced support for a deferral, but the United States’ opposition has “neutralized these efforts”).

31. See Rome Statute, *supra* note 18, art. 14 (“A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appears to have been committed . . .”). Subsequent articles lay out the process by which the Prosecutor investigates the “situation” and if he concludes there is a reasonable basis to proceed, requests the Pretrial Chamber to authorize a formal investigation. See also Rome Statute, *supra* note 18, arts. 13, 15 (setting out the three situations where the ICC may exercise jurisdiction, including situations where the Prosecutor may initiate an investigation on his own).

32. See generally *Issue #91*, *supra* note 25 (describing the Prosecutor’s initiation of an investigation in the case of Cote d’Ivoire; self-referrals in the case of the Democratic Republic of the Congo, Uganda, the Central African Republic and Kenya; and U.N. Security Council referrals for Sudan and Libya).

33. See Michael Gerson, Op-Ed., *Reforming Congo’s Rebels*, WASH. POST, Aug. 26, 2011, at A15 (explaining that General Bosco Ntaganda, despite being indicted by the ICC, remains free).

34. See generally Report of the Special Rapporteur on Extrajudicial,

According to newspaper reports, that may be because the DRC has subsequently incorporated rebel forces into its own militia, including the subject of the unexecuted fifth warrant, Ntaganda, and does not appear anxious to execute the warrant on "one of their own."³⁵

The Ugandan government originally referred a situation to the ICC involving massive atrocities allegedly committed against civilians by the Lords Resistance Army ("LRA") under the command of rebel leader Joseph Kony and several of his lieutenants. Five warrants were issued; none of which have been executed (two subjects have been killed). ICC supporters and the U.S. Ambassador to Uganda claim nonetheless that the issuance helped to entice Kony to peace negotiations, which, while not ultimately consummated, were followed by a temporary cessation of Kony's atrocities in Uganda.³⁶ On the other hand, Kony, according to the ICC Prosecutor and the UN Secretary General, has since been responsible for thousands of more killings and abductions and hundreds of thousands of displacements in the CAR and in Southern Sudan.³⁷ Repeated calls for help from other African countries and the African Union in apprehending Kony and cutting off his supply sources have

Summary or Arbitrary Executions, *Addendum: Mission to the Democratic Republic of the Congo*, ¶106, U.N. Doc. A/HRC/14/24/Add.3 (June 1, 2010) (describing General Bosco Ntaganda as the "most brazen example of impunity," because he has not been arrested despite having an outstanding ICC arrest warrant for enlisting child soldiers and other war crimes).

35. See Gerson, *supra* note 33 (reporting that Tutsi rebel leader General Bosco Ntaganda, despite his outstanding ICC warrant, now belongs to the DRC army, roams freely in the capital, dines in the best restaurants, and plays tennis at a major hotel).

36. See, e.g., Yvonne Terlingen, Letter to the Editor, *Amnesty for Ugandan?*, N.Y. TIMES, Sept. 20, 2006, <http://query.nytimes.com/gst/fullpage.html?res=9E05E4D71031F933A>

1575AC0A9609C8B63 ("Far from being a stumbling block, the indictment has served as a catalyst for the cease-fire that has finally brought hope to the thousands of children kidnapped by the Lord's Resistance Army and forced to commit the most appalling crimes.").

37. See *Issue #97*, *supra* note 6, at 3 ("Since early 2008, the LRA is reported to have killed more than 2,000, abducted more than 2,500 and displaced well over 300,000 in DRC alone. In addition, over the same period, more than 120,000 people have been displaced, at least 450 people killed and more than 800 abducted by the LRA in Southern Sudan and the Central African Republic.").

not yielded results.³⁸ In Kony's case the referring State appears impotent to capture him as do the neighbors he is terrorizing, the UN, and other international groups who have continually called for his seizure over the past six years. Kony has publicly said he will never surrender to the ICC.³⁹ Uganda has set up its own war crimes tribunal in the interim. One commentator has warned that self referrals may be used manipulatively by referring countries to bring certain situations under ICC jurisdiction when they are capable of trying those cases themselves while retaining more desirable ones in their own national system.⁴⁰ In short, the ICC is in danger of being asked to do the referring State's dirty work, running the risk that it will become a "garbage can" for national criminal systems to dump difficult or even politically dangerous cases.⁴¹ If that happens, its intended function as a court of last resort will suffer.⁴² In sum, the self-referral mechanism frequently used and encouraged by the Prosecutor to, *inter alia*, facilitate arrests may have a built-in potential for manipulation.

The doctrine of complementarity, a key component of the Rome Statute, is potentially a second means of securing apprehension of a war criminal even if the end result is to prosecute him in a national court, not in the ICC. The Rome Statute provides that any country can intercede in an ICC

38. See Office of the Prosecutor, Int'l Criminal Court, *Kenya*, 89 OTP WEEKLY BRIEFING, May 24–30, 2011, at 2 [hereinafter *Kenya Report*], available at http://www.icc-cpi.int/NR/rdonlyres/C16AB7D3-3BBA-4753-84FB-7E802BDB7CE0/283406/OTPWeeklyBriefing_2430May2011.pdf

(describing the U.N. Secretary-General's report, which welcomed efforts to develop a sustained coordinated strategy to deter attacks by the LRA in the DRC); see also *Issue #97*, *supra* note 6, at 1 (noting that the U.N. Security Council called for greater cooperation to execute ICC warrants against the LRA leaders).

39. See Jeffrey Gettleman & Alexis Okeowo, *Warlord's Absence Derails Peace Efforts in Uganda*, N.Y. TIMES, Apr. 12, 2008, <http://www.nytimes.com/2008/04/12/world/africa/12uganda.html> (reporting that Kony "will not surrender until the [ICC] indictments are lifted").

40. See Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528, 539-53 (2011) (discussing this conundrum in full).

41. *Id.* at 576-77.

42. See *id.* at 560-61 (explaining that the Court's role is to act "only when there is no feasible alternative forum for investigation and prosecution").

investigation or proposed prosecution on the ground that it has conducted or is conducting its own investigation or prosecution for the same conduct.⁴³ Unless the ICC Prosecutor can demonstrate to a Pretrial Panel that the country is unable or unwilling to bring a genuinely fair and purposeful investigation, prosecution, or trial, the ICC must step aside for at least six months (or unless circumstances change) and allow the country to handle the case. If ICC monitoring shows the State is not seriously pursuing the case, the ICC can reclaim the accused.⁴⁴ Theoretically, a country may be more willing to vigorously pursue an alleged war criminal if it can bring him to trial in his own country rather than hand him over to foreign judges for trial in a faraway land. There are examples of complementarity working.⁴⁵

Some commentators however have complained that the ICC is too rigid in its application of complementarity by insisting that the ICC accused be tried for precisely the same conduct in the national courts as is set forth in the ICC warrant. Some other commentators argue conversely that local prosecutors should charge the suspect with a “crime against humanity,” rather than

43. See, e.g., Rome Statute, *supra* note 18, art. 17 (“[T]he Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it . . .”).

44. See *id.* art. 18(3) (stating that the Prosecutor’s deferral to the investigation by the State is subject to review within six months or at any time based on a change in circumstances); see also Coal. for the Int’l Criminal Court, *Increasing Global Commitment to the Principle of Complementarity*, 42 THE MONITOR, May–Oct. 2011, at 6 [hereinafter *Increasing Global Commitment to Complementarity*] (describing complementarity as the “cornerstone” of the ICC, which “requires that states assume primary responsibility for prosecuting grave crimes in national or regional courts”).

45. See, e.g., *Issue #91*, *supra* note 25, at 2–3 (noting that the OTP assisted Uganda’s investigation and trial of Thomas Kwoyelo, a LRA commander, and arranged that any information shared with Ugandan authorities be used in a trial that meets international justice standards); Office of the Prosecutor, Int’l Criminal Court, *German Court Opens Trial Against Top FDLR Leadership*, 85 OTP WEEKLY BRIEFING, Apr. 26–May 2, 2011, at 2, available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/weekly%20briefings/otp260402052011> (noting that the German court tried FDLR DRC rebel leaders for war crimes and crimes against humanity under Germany’s implementation law of the Rome Statute, which was cited as “one of the best examples of complementarity provided for by the Rome Statute”).

murder or rape even if they are based on the same conduct. A national prosecution for a serious crime of the same genre, even if it does not involve precisely the same conduct that the ICC would charge, should suffice to keep the ICC at bay.⁴⁶ To the extent that the ICC can hand over investigations or prosecutions conscientiously to national courts with reasonable assurances they will be punished at a comparable load of gravity legitimate aims of the Rome Statute will be satisfied. This could mean, however, that the national government's realistic chances of apprehending the accused should be a component of that decision.

Finally, the ICC Prosecutor has initiated a more informal program of "positive complementarity." Upon receiving information indicating possible commission of war crimes within his jurisdiction, but about which he does not yet have sufficient information to open a formal investigation, he may begin a "preliminary investigation," which can encompass not only fact-finding on the alleged crimes but also the capabilities of the country's law enforcement and judicial organs to conduct fair and efficient operations. In this endeavor he can encourage other countries and nongovernmental entities to donate money and technical assistance to struggling countries to upgrade their facilities. Although stressing the Court "is not a development agency" and will not directly provide money or technical know-how, the Prosecutor has said he may encourage other entities to do so and will in appropriate cases share his information with the national authorities.⁴⁷ There are now nine "preliminary investigations" ongoing (some for as long as six years) in

46. Cf. Fairlie, *supra* note 40, at 567-71 (suggesting that the principle of complementarity applies to situations where national courts are prosecuting the accused under different charges than those that formed the basis for the prosecutor's application for an arrest warrant); *Prosecutor Reports to UNSC*, *supra* note 2, at 1 ("[A] case is only inadmissible if the State is investigating or prosecuting the same person for the same conduct that is the subject of the case before the Court" and thus a State's future "promis[e] to conduct proceedings is not a valid reason to modify this substantive criterion.").

47. See, e.g., Int'l Criminal Court, Assembly of State Parties, *Report of the Bureau on Stocktaking: Complementarity*, ¶¶ 28-36, U.N. Doc. ICC-ASP/8/51 (Mar. 18, 2010) (suggesting that the Court and State Parties should "facilitat[e] the exchange of information . . . aimed at strengthening domestic jurisdictions").

Afghanistan, Colombia, Georgia, Palestine, Cote d'Ivoire, Guinea, Nigeria, Honduras, and Korea.⁴⁸ If successful, the reinvigorated local law enforcement and courts could identify and capture war criminals, particularly lower and midlevel perpetrators, while saving the resources of the ICC for the "big fish."⁴⁹

C. OTHER NONSTATUTORY FORMS OF COOPERATION

Assuming that a State sincerely wants to cooperate with the international court by turning over an accused, what techniques have proven useful? Rewards up to ten million Euros for information leading to the arrest of ICTY defendants Mladic, Karadzic, Hadzic, and others were offered for several years, though it is disputed whether they played a significant role in those defendants' ultimate capture.⁵⁰ There is greater agreement that pressure from the EU and its members, particularly the Netherlands, denying Serbia accession to the EU until it demonstrated vigorous efforts at locating and arresting the fugitives played a stronger role, although even their opinions differ as to whether Serbia was on the brink of being admitted even before Mladic was captured. Months before his capture, the EU President had announced Serbia was on a "positive track" toward imminent membership though the Netherlands and the ICTY Chief Prosecutor demurred on the energy of its efforts.⁵¹

48. See *Issue #91*, *supra* note 25, at 4-5; see also Coal. for the Int'l Criminal Court, *An Overview of ICC Preliminary Examinations*, 41 THE MONITOR, Nov. 2010-Apr. 2011, at 11 (presenting an overview of preliminary examinations underway for crimes committed in Afghanistan, Colombia, Cote d'Ivoire, Palestine-Gaza, Georgia, and Guinea).

49. Cf. Gurd, *supra* note 5, at 27-28 (highlighting how the limited resources of the ICC and lack of a standing police force means that the ICC relies on domestic authorities to execute arrest warrants against "big fish").

50. See Roknić, *supra* note 5 (concluding that the increased rewards for the capture of Mladic and Hadzic did not lead to the capture of Mladic, and reporting Serbia's interior minister comment that the capture of Mladic had "nothing to do" with the reward amount).

51. See Barroso: *Serbia on Positive Track Towards EU Membership*, ALLVOICES (Jan. 31, 2011, 2:38 PM), <http://www.allvoices.com/contributed->

NATO for many years, though sometimes erratically, followed a similar policy of “conditionality” in withholding membership from Balkan countries.⁵²

When Mladic’s arrest finally happened, Western media touted it as a “victory for Western diplomacy.”⁵³ One commentator said it illustrated “the intensity, determination, and creativity needed by courts, states, and civil society to make state cooperation happen even when the chances of success look slim.”⁵⁴ There appears a consensus that “of the strategies available for forging cooperation, conditionality – on aid, group membership or trade benefits – has been the most successful in securing arrests.”⁵⁵ Withholding of military and economic aid from a country suspected of harboring an accused is a negative form of cooperation that court supporters cite as a successful spur to intensified efforts by a country to arrest fugitives. In the case of the most notorious ICTY accused, the United States’ persistent inclusions in the early 2000s in appropriation legislation for aid to Serbia of conditionality clauses requiring Department of State certification of Serbia’s cooperation in tracking down fugitives, followed in the second half of the decade by the EU’s similar requirement, accounted for the majority of arrests. The withholding technique can, however, be difficult to utilize

news/8054625-barroso-serbia-on-positive-track-towards-eu-membership (reporting that European Commission President Jose Manuel Barroso urged Serbia to obtain “concrete results” in capturing Mladic and Hadzic); *see also* *The Netherlands Wants Debate on Serbia’s EU Bid Postponed*, SETIMES.COM (Oct. 14, 2010), http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2010/10/14/feature-01 (discussing the Dutch Parliament’s postponement of the decision on Serbia until Serbia shows full cooperation with the ICTY).

52. *See* KIM, *supra* note 23, at 4 (providing a comprehensive discussion of the EU/NATO relationship with the Balkan countries based on the “conditionality of their efforts to obtain custody of the notorious defendants); Woehrel, *supra* note 23 (exploring the conditions that the United States placed on aid to Serbia, including the condition that Serbia cooperate with the ICTY).

53. Editorial, *Ratko Mladic’s Capture is a Victory for Western Diplomacy*, WASH. POST, May 27, 2011, at A20.

54. Gurd, *supra* note 5, at 28.

55. *Id.* at 31. *See also* *A Step Forward in Serbia*, *supra* note 3 (asserting that Mladic’s arrest shows that “concerted and sustained pressure from Western governments can produce results on human rights”).

because of counter interests of the donor government in providing such aid. Ironically, the United States threatened to cut off military and economic aid in the early 2000s to any country that agreed to turn over US residents under ICC warrants to the Court.⁵⁶ Ultimately, the U.S. has pulled back from such pressure in part because other countries like China threatened to fill the void.⁵⁷ More recently, the U.S. Ambassador to Sudan threatened to halt a process for taking Sudan off the State Sponsors of Terrorism list if it continued to support Kony's LRA in Uganda.⁵⁸ Journalists, NGOs, and civil society in general can and have operated as nonofficial agents of cooperation in locating and tracking down fugitives as well as bringing pressure on governments to hand them over to the ICC. These sources can provide information leading to the whereabouts of accused persons and through their exposure of governmental recalcitrance or inefficiency they can create public pressure for arrests. In Nigeria, a public clamor to withdraw asylum status from Charles Taylor, former President of Liberia, helped to bring about his flight from that country and handover to the Special Court for Sierra Leone. On the other hand, the media can reveal a disturbing lack of public sentiment for arrests. A poll a month before Mladic' arrest in Serbia showed that only 15 percent of those polled supported full cooperation with the ICC, and 35 percent said Serbia should not assist in Mladic's seizure under

56. Cf. WILLIAM H. TAFT IV ET AL., AM. SOC'Y FOR INT'L LAW, U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT 7-12 (2009) (describing the various efforts of the U.S. government to exempt U.S. citizens from the jurisdiction of the ICC, including the American Service-Member's Protection Act of 2002 and "Article 98" agreements).

57. Cf. *id.* at 12 (noting that some of the unintended consequences of the United States' restrictive behavior include limited access and interaction with partner nations, which some military officials are concerned may create even more of an opening for China's emerging presence).

58. Cf. Elizabeth Palchik Allen, *Why Obama's War in Uganda Isn't Just About Humanitarianism*, THE NEW REPUBLIC (Nov. 7, 2011), <http://www.tnr.com/article/world/97107/uganda-war-lords-resistance-army-humanitarian> (describing how Sudan's support for the LRA is "one reason why the group has survived for so long" and noting that Sudan's support has lessened due to "the Sudanese government's desire to avoid being blacklisted as a U.S.-designated state sponsor of terrorism").

any circumstances.⁵⁹ At any rate, civil society groups have become important players in the court's operation. The Coalition for the International Criminal Court is an umbrella organization for more than forty local and regional organizations across the globe that mobilize constituencies to campaign for ratification of the Rome Treaty, passage of implementing legislation for cooperation, and execution of Court judgments and arrest warrants.⁶⁰ Other organizations and coalitions engage in similar activities and the Prosecutor's office meets regularly with these groups to solicit, incentivize, and orient their cooperation. It is difficult to evaluate the impact of this outside pressure but, for example, wide media coverage of civil society group protests of proposed visits by Al Bashir to other countries have been considered instrumental in the cancellation of some such visits.⁶¹ Unfortunately, these forms of diplomatic and civil society cooperation, valuable, and indispensable to the Court as they may be, must confront formidable real world obstacles in hostile territories.

D. OBSTACLES TO COOPERATION IN APPREHENDING HIGH LEVEL ACCUSED

An assessment of the obstacles facing an international court in apprehending accused starts with the basic doctrine of national sovereignty. International courts have no police forces of their own but, even if they did, most countries are reluctant to give a free pass to any country or international body to enter their territory and arrest their residents. For example, consider the mixed reaction in Pakistan following the United States'

59. Roknić, *supra* note 5; see also Jovana Gec, *Mladic Supporters, Police Clash During Demonstrations*, WASH. POST, May 30, 2011, at A6 (explaining that 7,000 pro-Mladic supporters demonstrated outside the Serbian Parliament demanding his release).

60. COAL. FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org> (last visited Oct. 21, 2011).

61. See Ndirangu, *supra* note 30, at 7, (describing the efforts by civil society and States Parties to prevent visits by Bashir to Kenya and the CAR).

successful assassination of Osama Bin Laden that was accomplished without assistance or even notification of Pakistani officials.⁶² Thus, in the final analysis, the onus on arrests has remained on the countries where the accused resides or has taken shelter. Sovereignty concerns are accentuated in many of these countries by the continuation in power of persons in the government or the military with residual loyalties to those they consider "homeland heroes," despite what the Court decides about the legality of those persons' wartime activities. Mladic's ability to withstand numerous "raids" and international pressures to hand him over for sixteen years is attributed to a corps of intractable military, intelligence, and other influential protectors with connections in the then current governments. When captures are facilitated by the suspects' own government, it is more often the case that new and reform minded governments have displaced those in which the sought-after leaders participated, e.g. Milosevic had already been effectively deprived of power in Serbia at the time of his handover and a reform government was in place when Mladic was finally arrested.⁶³ Hardest of all to contend with is the apprehension of a Head of State who still wields official power, as in the case of Al Bashir in Sudan. It is unlikely that a leader will hand over the reins of power until, or unless, a coup takes place. Indeed, despite clear authority in the Rome Statute rejecting any impunity for sitting Heads of State, decisions of the International Court of Justice and debate among international scholars raise doubts for some that international law permits such

62. See Karin Brulliard, *In Pakistan, Civilian Government Now Feeling Backlash*, WASH. POST, May 8, 2011, at A12 (detailing the reaction of a former minister of the Pakistani government who called for the resignation of civilian government after the United States raid, deeming it a "failure of government" and a violation of sovereignty).

63. See Editorial, *End of the Line*, WASH. POST, May 27, 2011, at A26 ("For more than 15 years, Mr. Mladic managed to evade capture, almost certainly with the help of some Serbian officials. Serbia's President Boris Tadic is a new sort of leader, and last year Serbia formally admitted responsibility for the Srebrenica massacre and apologized"); see also *A Step Forward in Serbia*, *supra* note 4 (observing that Mladic and Bosnian Serb leader Radovan Karadzic "lived more or less in the open for years protected by the army and strongman Slobodan Milosevic.").

prosecutions.⁶⁴ In any case, the overall chances of securing custody of a Head of State continue to be limited.

Sometimes a divided government can aid the arrest process. Attentive court personnel and cooperative neighbors or supporting States may be able to cultivate dissident elements in a divided government, which can help in locating and planning future arrests. On the other hand, despite cooperation at the highest level in some countries, other powerful operatives in the government who are accused by the ICC may continue to present strong obstacles to its effective processing. Thus, the ICC Prosecutor recently cited reports that Kenyan residents were facing “threats, intimidation, and other attempts to discourage participation in [his] investigation . . . the Prosecution considers that currently the suspects [who were allowed to remain free pursuant to a negotiated summons] have the ability to influence the Government of Kenya policy and that any information provided to the Kenyan authorities can be used to attack victims and witnesses.”⁶⁵ He noted that in a fraud trial in the Kenya court involving one of the leaders accused of international war crimes by the ICC, “it is noteworthy that five witnesses slated to testify against him died before trial, thirteen witnesses

64. See generally GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 172-78 (2005) (providing an overview of principles of immunity under international law); Rosanne van Alebeek, *Immunity and Human Rights?: A Bifurcated Approach*, 104 AM. SOC'Y INT'L L. PROC. 67, 70-72 (2010) (addressing whether immunity extends to “international crimes” alleged in domestic courts). Compare Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶¶ 51, 53-54 (Feb. 14) (reviewing the immunities accorded under customary international law to ministers for foreign affairs and concluding that “the functions of a Minister for Foreign Affairs, are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability”), with Rome Statute, *supra* note 18, art. 27(1) (“This Statute shall apply equally to all persons without any distinction based on official capacity.”).

65. See Office of the Prosecutor, Int'l Criminal Court, *Prosecution Files Response re Request for Assistance Kenyan Government – Disclosure Would be Unacceptable Risk for Victims and Witnesses*, 86 OTP WEEKLY BRIEFING, May 3-10, 2011, at 1 [hereinafter *Prosecution Files Response*], available at http://www.icc-cpi.int/NR/rdonlyres/7D680A65-DCF9-4D5B-B7E3-BE6D7A5A9FA6/283302/OTPWeeklyBriefing_310May2011.pdf http://www.icc-cpi.int/NR/rdonlyres/7D680A65-DCF9-4D5B-B7E3-BE6D7A5A9FA6/283302/OTPWeeklyBriefing_310May2011.pdf.

disappeared and could not be located, and remaining witnesses who survived and were available to testify recanted their previous incriminating accounts and exculpated [the accused].”⁶⁶ The Prosecutor has also said he will not “take formal evidence” pertaining to the Libyan warrants from sources inside the country “because of fears that they would suffer repercussions.”⁶⁷

Additional obstacles to securing custody of an accused leader arise when the country is at war, as is true in several of the African countries whose situations have been referred to the ICC. The ad hoc ICTY and ICTR and the hybrid SCSL deal only with accused in the aftermath of civil and regional wars already finished. Ongoing conflict at the time warrants are issued often means war crimes are still being committed on both sides, thereby lowering the incentive of either side to cooperate; evidence is also more likely to be destroyed in the chaos of war; and witnesses are inaccessible. In the cases of Sudan and Libya, the Prosecutor has apparently decided that the risk of harm to ICC personnel operating physically in those territories is too great.⁶⁸ As a result, in-country “third party intermediaries,” friendly native individuals, and private groups have been used in Sudan to gather information, causing in some instances physical risks for them and difficulties for the prosecutors and the Court, resulting from defense challenges to their objectivity, accuracy, and the quality of their supervision.⁶⁹

66. *Id.*

67. See Michael Birnbaum, *Court Action Increases Pressure on Gaddafi*, WASH. POST, May 17, 2011, at A10.

68. See Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFFAIRS (Spring 2009), <http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders> (noting that, when criticized for failing to conduct interviews in Darfur, ICC Prosecutor Moreno-Ocampo responded that “Darfur was too dangerous for investigations and that victims and witnesses couldn’t be protected from the wrath of the Sudan government”).

69. See Coal. for the Int’l Criminal Court, *Developing an ICC Policy on Intermediaries*, 41 THE MONITOR, Nov. 2010–Apr. 2011, at 9–11 (describing the OTP’s reliance on intermediaries in identifying suspects, facilitating direct access to remote regions, and conducting outreach to victims, but observing that intermediaries are often in “precarious” position because they lack official status, protection, and material support and they are subjected to

Finally, apprehension of ICC suspects is only one aspect of most countries' foreign policy and may be trumped by other national interests that countermand cooperation with the ICC and militate continued good relations with the resistant ruling factions in countries harboring fugitives. This appears to have happened at least temporarily in Sudan's case. The perceived need to involve Northern Sudan in the negotiations surrounding the referendum for independence of Southern Sudan reportedly led to a diminution of efforts to press for the handover of Al Bashir who was considered key to a peaceful transition. As a result, an increase in atrocities against civilians, particularly women, in the Darfur camps has been reported during this period, and, ironically, new atrocities attributed to Bashir in one of the disputed areas on the North/South Sudan border.⁷⁰

Additionally, there is little question that decisions on the timing of issuing or attempting to enforce international court indictments against leaders can, in its own right, affect global politics by effecting the leader's presence or absence at key events, such as peace negotiations. Karadzic's and Mladic's indictments in 1995 kept them from attending the Dayton Peace conferences where they were expected to create discord; on the other hand Milosevic's presence was apparently considered potentially helpful.⁷¹ The Libyan situation, discussed below, has

intimidation). The ICC has adopted draft guidelines for use of intermediaries. *Id.* at 9; *see also id.* at 10-11 (highlighting how Thomas Lubanga's defense team demanded the disclosure of intermediaries' identities, on grounds that the intermediaries coached witnesses and fabricated evidence, but that OTP rejected this demand).

70. *See* George Clooney & John Prendergast, Op-Ed., *Avoiding the Next Darfur*, WASH. POST, May 28, 2011, at A17 (noting that Al Bashir is "escalating bombing and food aid obstruction in Darfur and he now threatens the entire north-south peace process"); *Issue #97, supra* note 6, at 3 (expressing the remarks of civil society groups that attacks in Sudan by Al Bashir are "an unbearable example of the threat to peace and security which can emanate from the failure to address accountability" and that "execution of the outstanding arrest warrants is critical for the sake of both justice and peace"); Eric Reeves, Op-Ed., *Genocide Anew in Sudan?*, WASH. POST, June 18, 2011, at A15 ("Too often with Sudan, empty demands and threats signal to the regime that the world is not serious about halting atrocities.").

71. *See* Goldston, *supra* note 12 (finding that, despite initial criticism of the indictments of Karadzic and Mladic prior to the Dayton peace talks, the absence of Karadzic and Mladic "may have helped U.S. officials find common

brought the issue into bas relief.

E. THE ICC ON THE LIBYAN BALANCE WHEEL

In May 2011, the Prosecutor of the ICC submitted requests to the Pretrial Chamber for arrest warrants for President Muammar Qaddafi, his son Saif, and the head of Libyan intelligence for war crimes, crimes against humanity, and genocide committed after February 15, 2011.⁷² The warrants were issued shortly thereafter. His request came within weeks of the referral in Resolution 1970 of the Libyan “situation” to the ICC from a unanimous fifteen member UN Security Council pursuant to Article 13(b) of the Rome Statute.⁷³ It was reported that the speed with which the warrant request was made reflected a purpose to delegitimize the Libyan ruler’s attacks on the civilian population rising against him and to attract defectors from his government and army.⁷⁴ The warrants were applauded and enforcement cooperation was promised by virtually all Western and some African countries (the United Kingdom, Denmark, France, Australia, Germany, Canada, Portugal, Nigeria, Lebanon, the European Union, Russia, and China).⁷⁵ The African Union, however, denounced the ICC action as “discriminatory,” told its

ground among Bosniaks, Croats, and Serbs”).

72. See Press Release, Coal. for the Int’l Criminal Court, ICC Prosecutor Requests Arrest Warrants Against Muammar al-Gaddafi, Saif al-Islam and Abdullah al-Sanusi (May 16, 2011), *available at* http://www.iccnw.org/documents/Libya_Warrants_CICC_MA_FINAL_16052011.pdf.

73. *Id.*; see also Rome Statute, *supra* note 18, art. 15 (permitting the ICC Prosecutor to examine situations referred to the ICC).

74. See Ellis, *supra* note 11 (explaining that the indictment was complete within four months because the prosecutor “was seeking to send a message that accountability should trump impunity.”).

75. See *Prosecution Files Response*, *supra* note 65, at 2 (reporting that “all fifteen member States expressed their support to the work of the Court”); Office of the Prosecutor, Int’l Criminal Court, *OTP Requests Arrest Warrants in Libya Situation*, 87 OTP WEEKLY BRIEFING, May 11–16, 2011, at 2 [hereinafter *Issue # 87*], *available at* http://www.icc-cpi.int/NR/ronlyres/3836B9AF-B0DC-4F94-A4A8-4115E95AE76E/283329/OTPWeeklyBriefing_1116May201187.pdf (relaying statements of support from various States); *Situation in the CAR*, *supra* note 9, at 2 (describing Libya’s Interim National Council’s commitment to enforcing arrest warrants).

members to disregard the warrants, and later petitioned the Security Council to defer the ICC investigation.⁷⁶ Qaddafi quickly announced that he had no intention of honoring the warrant, his representative calling the court “an organization clearly formed to prosecute people from the Third World.”⁷⁷ Press reports commented on the risk of “such a politically sensitive prosecution in the midst of an armed conflict,” worrying that it would “complicate efforts to get Gaddafi to step down.”⁷⁸ Concern was also expressed that the possibility of a negotiated exile might be more effective to stop the slaughter. According to one, the warrant gave him “a powerful incentive to fight to the death, greatly prolonging what could have been a short war.”⁷⁹ Indeed, before the warrants were issued there were reports Western and African countries were reconnoitering for a country who was not a party to the Rome Statute, which would grant Qaddafi a safe haven, and one report surfaced that U.S. officials asked Russia to find such a country and Russia replied that it could.⁸⁰ The OTP, on the other hand, was adamantly insisting that any new government in Libya “would be obliged to arrest him”⁸¹ and the rebel leaders at first indicated they would bring

76. *African Union Opposes Warrant for Qaddafi*, N.Y. TIMES, July 3, 2011, at A10.

77. Colum Lynch, *International Court Issues Warrant for Gaddafi, Aides*, WASH. POST, June 28, 2011, at A9.

78. *Id.*

79. See Jackson Diehl, *After the Dictators Fall . . .*, WASH. POST, June 6, 2011, at A17 (noting that “the more immediate and uncompromising the justice for a dictator, the worse it is for the post-revolution regime”); see also Richard Cohen, *Who Will Take in Mubarak and Gaddafi?*, WASH. POST, Aug. 12, 2011, at A17 (arguing that “it would be best for everyone involved if some government simply offered [Gaddafi or Bashar al-Assad] sanctuary”); William C. Goodfellow, *A St. Helena Home for Gaddafi?*, WASH. POST, June 3, 2011, at A17 (speculating about the cost of issuing an arrest warrant for Gaddafi and observing that President Obama wished to “avoid a repeat” of the unnecessary bloodshed in Ivory Coast).

80. See Ellen Barry, *In Diplomatic Reversal, Russia Offers to Try to Persuade Qaddafi to Leave Power*, N.Y. TIMES, May 28, 2011, at A10 (describing Russia’s effort to use its leverage to persuade Qaddafi to leave office); see also David E. Sanger & Eric Schmitt, *U.S. and Allies Seek a Refuge for Qaddafi*, N.Y. TIMES, Apr. 17, 2011, at A1 (reporting that the Obama administration and the African Union searched for a country that has no ICC obligation that would provide shelter to Qaddafi in the event he was removed from power).

81. See *Issue #97*, *supra* note 6, at 3.

him before the ICC.⁸² Once the warrants were issued, reports of inquiries about possible exile disappeared, Qaddafi fought on, although the debate on the wisdom and timing of the warrants continued.

The OTP did announce that while it was calling for full cooperation with its investigation, the Court was not asking for international forces operating under the Security Council Resolution 1973 to implement the arrests.⁸³ Instead, it was up to the interim government in Libya (NTC) to make the arrests.⁸⁴ More recently, the Libyan government has been reported as saying it intends to bring Qaddafi to trial in its own courts, consistent with international justice standards,⁸⁵ though whether

82. See Office of the Prosecutor, Int'l Criminal Court, *Kenya*, 93 OTP WEEKLY BRIEFING, June 21–27, 2011, at 3, available at http://www.icc-cpi.int/NR/rdonlyres/341D49AF-6BDB-4920-8C00-83878BC19C3E/283532/OTPWeeklyBriefing_2127June2011.pdf (explaining that Mohamed Al Alagi, the Justice Minister for the Interim National Council-Libya expressed that the INC would fully cooperate).

83. *Id.* (recognizing that Resolution 1973 had “no specific mandate [for international forces] to implement arrest warrants” and instead Libya was primarily responsible for making such arrests).

84. *Id.* If the interim transitional Libyan group government (NTC) persists in its determination to try Qaddafi in national courts, it must confront the disastrous experience of the Iraqi trial and execution of Saddam Hussein, which despite substantial behind the scenes American assistance got generally bad marks for politization, inability to maintain order and letting the defendants take control of the courtroom. The ICC, the UN, and Western leaders generally would not provide assistance because the death penalty was on the table. See generally, e.g., MICHAEL NEWTON & MICHAEL SCHARF, *ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN* (2008); PATRICIA M. WALD, *TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM* (2009). Egypt's post conflict government also decided to bring its former President Mubarek to trial in a national court soon after he stepped down. But assessments of the wisdom of that effort are mixed. See Editorial, *Egypt's Revolutionary Justice*, WASH. POST, June 4, 2011, at A12 (stating that the trials of Mubarak and former ministers lack independent judges, lack sufficient evidence, and are too rushed); see also Anthony Faiola, *Mubarak Trial Comes to a Halt*, WASH. POST, Sept. 25, 2011, at A13 (stating that the victims' lawyers in Mubarak's trial lost faith in impartiality of judges and moved to have new judges appointed).

85. See Karen DeYoung & Leila Fadel, *Obama Asks Libya's Neighbors to Arrest Fugitive Loyalists*, WASH. POST, Sept. 7, 2011, at A10 (explaining that the United States has been encouraging states neighboring Libya to arrest high level Qaddafi loyalists fleeing over their borders, some of whom may be “under indictment by the International Criminal Court.”).

that includes seeking the death penalty is unclear.

F. THE PATH FORWARD

The ICC, as well as its supporters and detractors alike, recognize that the expeditious handover of its accused, particularly its most notorious high-level defendants, is still a substantial hurdle to its credibility. Yet for all the reasons discussed, such captures often involve thorny political and diplomatic considerations not encountered in national prosecutions. But are there further steps that might improve their record, especially the ICC's, since most of the other ad hoc courts are either in an exit strategy or have secured all their indicated suspects?

In June 2010, the ten-year review of the ICC by the Assembly of State Parties ("ASP") at Kampala featured a "stocktaking" of its operations that included a focus on apprehension of suspects and the cooperation of States Parties in that endeavor.⁸⁶ Preparatory work was done for the meetings by a Hague Working Group and culminated in a renewed declaration of cooperation adopted by the Court's governing body, the ASP, which undertook to monitor and oversee cooperation under its authority in Article 112 of the Rome statute.⁸⁷ Cooperation by ASP members was made a standing item on the permanent agenda of regularly scheduled ASP meetings; a facilitator for cooperation was appointed to keep track of developments and problems, and to arrange for the exchange of best practices in cooperation, as well as to assure political and diplomatic support for the Court in related UN activities. Individual countries pledged to cooperate in enforcing ICC judgments and decisions,

86. See *Increasing Global Commitment to Complementarity*, *supra* note 44, at 6-8.

87. See Coal. for the Int'l Criminal Court, *ICC Review Conference: Global Coalition Calls on States to Honor Kampala Commitments to Cooperate with the ICC*, 41 THE MONITOR, Nov. 2010-Apr. 2011, at 1, 8-9 (discussing the Declaration on Cooperation adopted by the ASP and emphasizing further steps necessary to address non-compliance pursuant to Article 112(f) of the Rome Statute); see also Rome Statute, *supra* note 17, art. 112.

to adopt the implementing legislation necessary for such cooperation, and to pursue bilateral and regional assistance agreements for such cooperation. This renewed commitment to cooperation took place two years ago and it may be early to assess its effect, though there have been no arrests of high level defendants such as Al Bashir or Joseph Kony since then. The ASP also said it would consider how better to enforce the Rome Statute's authorization for sanctions against noncooperation reported by the Court to the ASP.⁸⁸ According to a 2010 Update Report, the Prosecutor has issued new guidelines for cooperation that stress eliminating nonessential contacts with an arrest subject, expressions of support for arrests in bilateral and multilateral meetings, taking steps to prevent diversion of humanitarian funds to benefit arrest subjects, and providing financial help to other countries to plan and execute arrests.⁸⁹ All of these steps are useful but conventional tries at getting better results in the hardest cases. However, two additional suggestions deserve consideration. First, the ICC Prosecutor should look internally at his operation to see if experience militates toward a more measured approach in deciding on the timing of warrants. One seasoned veteran of both the ad hoc and ICC courts opines that the OTP has not always had a "sustainable long-term strategy" for apprehending high level defendants other than exhortations to others to cooperate; it has proceeded opportunistically.⁹⁰ The Prosecutor of course would deny this and point to his public caution in the case of Libya: "arrests cannot be successfully conducted without serious planning and preparation, which takes time. The international community should take steps now to assist on such

88. See Coal. for the Int'l Criminal Court, 42 THE MONITOR, May–Oct. 2011, at 7 (explaining that the ASP passed a resolution titled "Strengthening the International Criminal Court and the ASP" concerning procedures aimed at dealing with incidents of non-cooperation).

89. See Int'l Criminal Court [ICC], Review Conference to the Rome Statute, May 31–June 11, 2010, *Report of the Court on Cooperation: Update*, ¶ 6, ICC Doc. RC/2 (May 11, 2010); see also *Kenya Report*, *supra* note 38, at 3 (explaining that thirty-nine human rights organizations urged greater efforts to execute the arrest warrant for Kony and other LRA leaders).

90. Memorandum from Stefanie Frease to Author (Jan. 11, 2011).

practical planning.”⁹¹ But it was not clear what others should do since he was equally clear that Libyan authorities had the primary responsibility to make the arrests: “Libyans will lead.”⁹² Admittedly, in Libya’s case the unanimous Security Council referral in addition to global outrage at Qaddafi’s atrocities put unusual pressure on the Prosecutor to act. But even in such crisis situations he must take account of the reality that the warrant is like crossing the Rubicon—it cuts off access to other avenues of diplomacy for resolving the crisis inspired by the leader’s presence. When it enters an ongoing furious conflict both the Prosecutor and the Court must be careful to preserve its nonpolitical image and not appear to be reacting or contributing to political or military strategies.⁹³

In less pressured cases than Libya, the ICC’s issuance of warrants, and more specifically the timing of their issuance, needs to account for the likelihood of apprehension within a reasonable time and a specific plan for bringing it about. These are difficult balancing decisions to make. Watching and waiting for the right moment to issue a request for a warrant may invite outside criticism for “dawdling.” Thus, the ICC was criticized first in the Darfur case for seeking warrants for Al Bashir’s subordinates and not going after Al Bashir but when the Prosecutor subsequently obtained a warrant against Al Bashir, he was further criticized for not taking account of the barriers to arresting him. ICC supporters as well as critics can be fickle and given to exhortations in lieu of positive aid, and their urgings should not dominate the Prosecutor’s decisions on warrants. The OTP needs staff that is politically astute and able to build

91. Office of the Prosecutor, Int’l Criminal Court, *Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970* ¶ 26 (2011), available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/ICC0111/Reports+to+the+UNSC/>.

92. *Issue # 97*, *supra* note 6, at 1.

93. See Ellis, *supra* note 11 (“Since its inception, the court has generated more than two dozen indictments and sowed no small amount of diplomatic discord . . . Unfortunately, contradictions and competing agendas undermine the credibility and effectiveness of prosecutors and diplomats alike . . . [D]iplomats and judicial authorities need to start looking for points of coordination . . . [and] to begin exploring common ground for the common good.”).

coalitions and alliances with friendly governments, NGOs, and journalists. It also needs seasoned investigators and prosecutors to provide the necessary technical and intelligence guidance and the ability to assess acceptable limits of risk to achieve desired results. Advanced military technology developed in the campaigns against terrorists offer an enticing promise. According to newspaper reports they include a body of "targeters" who collect data from multiple sources and pinpoint the location of their targets in faraway places.⁹⁴ The results are not only used for drones or "taking out" the subjects but also for arranging their capture. Admittedly, the United States is not an ICC member but is it ridiculous to think that some constructive dialogue can be had with their experts so as to improve the Court's searches for warrant subjects? This is surely a challenge for a new prosecutor slated to take over in the next year.

Second, with the success of the foray by the U.S. Navy SEALs in Pakistan to "take out" Bin Laden, sentiment is sure to resurface for an international force to apprehend ICC suspects. This idea has been the subject of interest in the past but apart from UN peacekeeping forces assisting at some level in post-Dayton Bosnian arrests and UN forces in Uganda, the problem of overcoming strong nationalist feelings about foreign enforcers invading a country has prevented its translation into a tangible plan. Nonetheless, the concept of an international force composed of skilled enforcement personnel from several ASP countries (and others who would join) who agree to recognize its authority to make arrests under accepted procedures is worthy of continued effort and it appears that such a project may be in progress. New York Times columnist Nicholas Kristof has suggested that rebel or populist forces along with their allies in a conflict could do a similar maneuver. "It would be a fine step toward ending global impunity for atrocities if a SWAT team of Libyans and coalition forces swooped down one day and seized Colonel Qaddafi to face trial in The Hague. . . . [I]t's an ending that

94. See Greg Miller & Julie Tate, *Since Sept. 11, CIA's Focus has Taken Lethal Turn*, WASH. POST, Sept. 2, 2011, at A1. Of course, since the United States is not a State Party to the ICC, its intelligence know-how is not usually available to the ICC although more congenial relations have evolved to allow for some exchanges at the United States' discretion.

would leave this Libyan incursion remembered not only for the lives it saved, but also as a milestone in the history of humanitarianism.”⁹⁵ It is too late for Libya, but an interesting thought for the future.⁹⁶

CONCLUSION

The ICC is being asked by States and the UN Security Council to take up more cases of long entrenched dictators facing popular revolts and to try them for past atrocities and crimes against humanity.⁹⁷ Qaddafi, now deceased, and Laurent Ghagbo, the recently deposed president of the Ivory Coast, are examples. These cases raise anew the tension between cooperation with the ICC in making arrests and other national interests, of requested cooperators in ending conflict and saving lives. One commentator has advised that the diplomats and the jurists must find common cause in the endeavor to do justice and save lives, but the outlines of that kind of cooperative venture have yet to be sketched. As the ICC enters its second decade, it remains critical that its credibility as not just a fair but also an effective mechanism for bringing the most notorious violators of international humanitarian law to justice not be impugned by a string of unexecuted warrants.⁹⁸ The ASP’s heightened attention

95. Nicholas D. Kristof, Op-Ed., *Is it Better to Save No One?*, N.Y. TIMES, Apr. 3, 2011, at 12.

96. The most thoughtful discussion of what such an international force would require and options for its structure is to be found in RICHARD COOPER & JULIETTE KOHLER, *The Case for an International Marshals Service*, in RESPONSIBILITY TO PROTECT ch. 14 (2009).

97. See, e.g., Robert Park, Editorial, *The Forgotten Genocide in North Korea*, WASH. POST, Apr. 21, 2011, at A17 (estimating that one million North Koreans have been killed in “political concentration camps since 1972”). Hybrid courts have similar problems. See David M. Crane & Carla Del Ponte, Editorial, *Bringing Hariri’s Killers to Justice*, WASH. POST, Aug. 17, 2011, at A13 (describing the UN mandated court to investigate and prosecute killers of former Lebanese president; prior Lebanese coalition government collapsed when it supported tribunal, indictments implicate Hezbollah members; predicted impotence of court to serve indictments or make arrests).

98. *The International Criminal Court Bares Its Teeth*, ECONOMIST, May 14, 2011, at 57, available at <http://www.economist.com/node/18682044>

to the problem coupled with a feasible plan for an international marshal force and ideally some transfer of technological locating advances from Islamic terrorism to apprehension of national leader terrorists could advance the cause. But a new Prosecutor and the Court may have to look inward at their criteria for issuing arrest warrants to increase the likelihood of their execution within a reasonable timeframe and fashion their requests for cooperation from other countries and international institutions in more specific and coordinated ways.

SUPPLEMENT

This essay was based upon a panel presentation at American University Washington College of Law in February 2011 and was submitted for publication over a year ago. Since that time, there have been many developments in cases and situations referred to therein. This supplement mentions several of the most significant ones; in the author's opinion none of the main issues presented have changed dramatically.

The trial of former Egyptian President Hosni Mubarek continued to be viewed by the international press as a "travesty" and a "hasty, politicized circus" without adequate proof of his guilt and inadequate time for his defense. He was sentenced to life in prison and is reportedly ill, though his trial was followed by protests that he was let off too easily.⁹⁹

Joseph Kony, the notorious LRA warlord continues on his murderous rampage in the Congo. President Obama authorized 100 troops to assist the Congolese army in his pursuit. A video entitled "Kony 2012" depicting his crimes against children went viral and was viewed by an estimated 112 million people worldwide.¹⁰⁰

(stating that "[t]he ICC's big weakness, apart from its astronomical cost and drawn-out procedures, is its dependence on others to help arrest suspects").

99. *No Justice for Mr. Mubarak: The trial of Egypt's former ruler is a travesty*, WASH. POST, Jan. 20, 2012, at A18; *Mubarak's Trial*, WALL ST. J., June 4, 2012, at A16.

100. Paul Farhi & Elizabeth Flock, *Invisible Children's 'Kony 2012' Video Goes Viral — But What Does this Mean?*, WASH. POST,

Bosco Ntaganda, another rogue rebel leader in the DRC indicted by the ICC, deserted the DRC forces in April 2012, and remnants of his former army are terrorizing the region. Then-Chief Prosecutor Ocampo declared "six years after the arrest warrant was issued, he is still at large, reportedly committing acts of violence against civilian populations." 142 local and international non-governmental organizations ("NGOs") called for his arrest. The ICC issued a new warrant for Ntaganda charging additional crimes against humanity and war crimes including murder, rape, sexual slavery, and pillage in the DRC.¹⁰¹

Al Bashir, the Sudanese President, indicted by the ICC for genocide and crimes against humanity, and his indicted minister Al-Haroun continued to cause trouble not only in Darfur but in the border Nuba region bordering recently liberated South Sudan. Haroun has been appointed by Al-Bashir as the governor of a key border province. A Kenyan court issued a warrant for Al-Bashir's arrest should he revisit that country and Germany threatened to boycott a Qatar conference if he attended. Seventy genocide scholars urged President Obama to cut off aid to countries that hosted Al Bashir and the U.S. House Appropriations Committee adopted an amendment, opposed by the U.S. Department of State, to suspend non-humanitarian aid to countries welcoming Bashir. Malawi announced that it would not allow him to attend an African Union summit it was hosting; the African Union objected, Malawi cancelled the summit, and it was moved to Addis Ababa.¹⁰²

http://www.washingtonpost.com/lifestyle/style/invisible-childrens-kony-2012-video-goes-viral--but-what-does-this-mean/2012/03/09/gIQA DMhF2R_story_1.html

101. Office of the Prosecutor, Int'l Criminal Court, 120 OTP WEEKLY BRIEFING, May 2-8, 2012, *available at* <http://www.icc-cpi.int/NR/rdonlyres/E7DD447E-F404-44F3-AACB-D0880DA5BAC6/284652/OTPWeeklyBriefing28May2012.pdf>; Office of the Prosecutor, Int'l Criminal Court, 127 OTP WEEKLY BRIEFING, July 4-23, 2012, *available at* <http://www.icc-cpi.int/NR/rdonlyres/3F67043D-DEC6-4F6F-AB15-DC7309335552/284787/OTPBriefing423July2012.pdf>.

102. Nicholas D. Kristof, In Sudan, Seeing Echoes of Darfur, N.Y. Times, Feb. 19, 2012, <http://www.nytimes.com/2012/02/19/opinion/sunday/kristof-in-sudan-seeing-echoes-of-darfur.html?ref=nicholasdkristof&r=0>; Office of the Prosecutor, Int'l Criminal Court, 125 OTP WEEKLY BRIEFING, June 12-19, 2012, *available at* <http://www.icc-cpi.int/NR/rdonlyres/1760B6F2-8B50-4ED0->

The Libyan saga, which began with another Security Council referral to the ICC proceeded without resolution of the ultimate question of where Qaddafi's son Saif and the former Libyan intelligence chief Sussani would be tried. Qaddafi himself was killed during his capture by rebels but his son is in Libyan custody and the intelligence chief was captured in Mauritania while attempting to flee.¹⁰³ The ICC and Libya's current government have been negotiating all year over the venue for the indictees' trials. The ICC judges have granted, with approval of the Office of the Prosecutor ("OTP"), a postponement of the request that they be turned over immediately to ICC custody and a reprieve granted until the issue of Libya's objection to Article 17 "Admissibility" is finally determined by the ICC appeals chamber. The OTP has however said publicly that it could agree to a Libyan trial only if assured that Libya's justice system met minimum international fairness standards including screening of detainees to release those against whom there is no proof of criminal conduct. Libya's deficiencies in its police, prosecuting, and judicial organs have been widely scored by human rights groups as well as its inability to protect all participants in a major criminal trial.¹⁰⁴ The OTP has also said it is investigating the same case against the ICC indictees as the Libyan court, for complementarian purposes, and is satisfied the Libyan authorities are taking "concrete investigative steps" although it is not clear that the defendants have been appointed counsel or allowed access to their own retained lawyers. In May, then Chief Prosecutor Ocampo announced to the Security Council he was collecting evidence for a second indictment against the Libyan defendants focusing on gender crimes but relying on doctors' and soldiers' testimony to avoid recrimination against cooperating victims. At one point four ICC staffers were

AF44-F769BACECCF9/284665/OTPWeeklyBriefing1219June2012.pdf; Office of the Prosecutor, Int'l Criminal Court, 105 OTP WEEKLY BRIEFING, Nov. 22-28, 2012, *available at* <http://www.icc-cpi.int/NR/rdonlyres/F30EC740-5BCE-4F99-B7D3-26B66D25A36A/284010/OTPWeeklyBriefing22November28November2011105.pdf>.

103. France, which has convicted Sussani in absentia, is also vying for his extradition to France.

104. Libya has said it is building a "five star" maximum security prison.

“detained” in Libya but ultimately released.¹⁰⁵

An update on the current status of ICC activities as of the end of July includes the appointment by the Assembly of States Parties (“ASP”) of Fatou Bensouda, as the new Chief Prosecutor.¹⁰⁶ Also, there was the completion of the first ICC trial and sentencing of Dyilo Lubanga of the DRC of fourteen years for conscripting children under the age of fifteen to participate in hostilities. Lubanga had surrendered in 2006. With the “self-referral” of its “situation” by Mali to the ICC in March 2012, the OTP now has seven situations under investigation and eight preliminary investigations over four continents.¹⁰⁷ Fifteen cases are in process involving twenty-four defendants (six in trial and one in pretrial), and there are twelve outstanding arrest warrants. The former President of the Ivory Coast Laurent Gbagbo, indicted by the ICC for conducting a murderous rampage after his defeat at the polls, surrendered voluntarily after his stronghold was interdicted by UN and French forces. The High Commissioner for Human Rights Navanethem Pillary called for referral of the horrendous ongoing Syrian situation by the Security Council to the ICC, an unlikely occurrence due to Russia and China’s reluctance the desert their longtime ally.

105. David Kirkpatrick & Marlise Simons, *Libya Resists International Court’s Claim on Qaddafi’s Son and Security Chief*, N.Y. TIMES, Mar. 22, 2012, at A6.

106. Office of the Prosecutor, Int’l Criminal Court, 127 OTP WEEKLY BRIEFING, June July4–23, 2012, *supra* note 101; Office of the Prosecutor, Int’l Criminal Court, 116 OTP WEEKLY BRIEFING, March 27–April 3, 2012, *available at* http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/weekly%20briefings/otp%20weekly%20briefing%202703_03042012.

107. It terminated the preliminary investigation of the Palestinian situation on the grounds that the UN, which was the appropriate authority to decide who constituted a “state” for jurisdictional purposes, had not yet declared the Palestinian authority to be such.